LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
NOV 9 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971.

No. 71-762

EDWARD HINES LUMBER CO., A DELAWARE CORPORATION,

Petitioner,

vs.

CENTEX-WINSTON CORPORATION, A NEVADA CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

CHARLES B. MAHIN,
RICHARD L. REINISH,
Attorneys for Petitioner.

PRICE, CUSHMAN, KECK & MAHIN,
134 South LaSalle Street,
Chicago, Illinois 60603,
Telephone: 726-9000,
Of Counsel.

December 10, 1971.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

INDEX.

	PAGE
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Statutory Provisions Involved	2
Statement of the Case	3
Reasons for Granting the Writ of Certiorari	4
1. The case presents an important question of first impression concerning the scope of a key provision of the Robinson-Patman Act	4
2. The decision below conflicts in basic principle with decisions of this Court and with decisions of other courts of appeal	14
Conclusion	19
Appendix:	
A. The Robinson-Patman Act (15 U. S. C. § 13)	A1
B. Opinion and Judgment of the Court of Appeals	A5
C. Opinion and Judgment of the District Court	A12
D. Complaint	A15
E. Motion to Dismiss	A18
F. Summary Judgment Order—Edward Hines Lumber Co. v. Centex Corporation	A19
G. Order of the Court of Appeals Denying Rehearing	A22

Authorities Cited.

Cases.

American News Company v. F. T. C., 300 F. 2d 104 (2d Cir. 1962), cert. denied, 371 U. S. 824 (1962).... 17

Chicago Spring Products Co. v. U. S. Steel Corp., 371 F. 2d 428 (7th Cir. 1966), affirming 254 F. Supp. 83 (N. D. Ill. 1966).....6, 18

Edward Hines Lumber Co. v. Centex Corp., No. 69 CH 4709 (Cir. Ct. of Cook County, 1970)..... 3

Elizabeth Arden, Inc. v. F. T. C., 156 F. 2d 132 (2d Cir. 1946), cert. denied, 331 U. S. 806 (1947)..... 6

Elizabeth Arden Sales Corp. v. Gus Blass Co., 150 F. 2d 988 (8th Cir. 1945), cert. denied, 326 U. S. 773 (1945) 6

F. T. C. v. Fred Meyer, Inc., 390 U. S. 341 (1968)....5, 15

F. T. C. v. Simplicity Pattern Co., 360 U. S. 55 (1959) 6, 14, 15, 16

P. Lorillard Company v. F. T. C., 267 F. 2d 439 (3d Cir. 1959), cert. denied, 361 U. S. 923 (1959)..... 16

R. H. Macy & Co. v. F. T. C., 326 F. 2d 445 (2d Cir. 1964) 17

Statutes:

15 U. S. C. § 13 (Robinson-Patnam Act)..... .....2, 3, 4, 5, 6, 8, 10, 11, 14

Section 2(a) 5, 6, 11, 12, 13, 14, 15, 16, 17

Section 2(c) 6, 15, 16

Section 2(d).....6, 7, 8, 10, 11, 14, 15, 16, 17

Section 2(e) .2, 3, 4, 6, 7, 8, 10, 11, 12, 13, 14, 15, 16, 17, 18

28 U. S. C. § 1254(1)..... 2

Legislative Material.

Report of the Senate Committee on the Judiciary, S. Rep. No. 1502, 74th Cong., 2d Sess. (1936) 7

Report of the House Committee on the Judiciary, H. R. Rep. No. 2287, 74th Cong., 2d Sess. (1936) 7

80 Cong. Rec. 6282 (1936) 7

80 Cong. Rec. 9417 (1936) 12

80 Cong. Rec. 9418 (1936) 7, 17

Miscellaneous.

Antitrust Developments—1955-1968, as amended, 1968-1969 Pocket Supplement (supplementing the Report of the Attorney General's National Committee to Study the Antitrust Laws, March 31, 1955) ,9

37 Antitrust Law Journal (Antitrust Section, A. B. A.) 80 10

Federal Trade Commission—Guides, 34 Fed. Reg. 8285 (1969) 8

Hills, Antitrust Advisor (1971) 8, 10

Oppenheim and Weston, The Lawyer's Robinson-Patman Act Sourcebook (1971), Vol. I, Preface 4

Report of the Attorney General's National Committee to Study the Antitrust Laws (March 31, 1955) 6

Rowe, Price Discrimination Under the Robinson-Patman Act (1962) 5, 6, 10, 11

Rowe, 1964 Supplement, Price Discrimination Under the Robinson-Patman Act 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971.

No. .....

EDWARD HINES LUMBER CO., A DELAWARE CORPORATION,

Petitioner,

vs.

CENTEX-WINSTON CORPORATION, A NEVADA CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioner, Edward Hines Lumber Co., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on August 25, 1971.

OPINION BELOW

The opinion of the Court of Appeals, 447 F. 2d 585 (7th Cir. 1971), and the opinion of the District Court, Civil Action No. 70 C 808 (1970), appear in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on August 25, 1971. A timely petition for rehearing was denied on September 13, 1971, and this petition for certiorari is filed within 90 days from that date. This Court's jurisdiction is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED

1. Whether differences in the timeliness of delivery services which have no direct or indirect relation to price are prohibited by Section 2(e) of the Robinson-Patman Act.

2. Whether Section 2(e) applies to delivery services other than advertising, promotional and like services connected with a buyer's resale of the seller's goods.

3. Whether Section 2(e) forces buyers and sellers into a distributive straitjacket of proportionally equal terms and conditions of delivery, regardless of cost justification and the absence of injury to competition.

STATUTORY PROVISIONS INVOLVED[1]

The United States Code, Title 15, § 13(e), states:

> "(e) It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity *bought for resale*, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale *of such commodity so purchased* upon terms not accorded to all purchasers on proportionally equal terms." (Emphasis added).

1. The Robinson-Patman Act is set forth in full in Appendix A.

STATEMENT OF THE CASE

Petitioner, Edward Hines Lumber Co. (herein "Hines"), is a manufacturer and distributor of lumber and related products which serves many builders and developers throughout the Chicago area, including respondent Centex-Winston Corporation (herein "Centex"). During 1968 and the first part of 1969, Hines supplied Centex with lumber and building components for houses being constructed by Centex.

After Centex accepted and failed to pay for the lumber and components, on March 17, 1969, Hines initiated suit against Centex in the Circuit Court of Cook County, Illinois. Thereafter, on April 7, 1970, Centex initiated the present action in the United States District Court for the Northern District of Illinois. In the state court suit, on July 21, 1970, Hines was granted summary judgment and execution against Centex in the amount of $146,134.36 for the unpaid purchase price of the material accepted and used by Centex.[2] A counterclaim by Centex was dismissed without prejudice in that case on November 25, 1970.

Centex' present action is brought under the Robinson-Patman Act (herein "the Act") and alleges discrimination against it in violation of that Act. However, the only allegation of discrimination in the complaint is that Hines delivered lumber less promptly to Centex than to Centex' competitors and that this violated Section 2(e) of the Act (Complaint, Appendix D). This alleged discrimination relates solely to *the time* of Hines' deliveries which Centex claims were "behind the agreed upon schedules" called for by the sales contract. There is no allegation that

2. *Edward Hines Lumber Co.* v. *Centex Corp.*, No. 69 CH 4709 (Cir. Ct. of Cook County, 1970), judgment set forth in Appendix F.

Hines engaged in any form of direct or indirect price discrimination or that Hines discriminated against Centex by providing its competitors any advertising, promotional or like services connected with the resale of Hines' goods.

On September 27, 1970, Hines filed in the District Court a motion to dismiss for failure of the complaint to state a claim upon which relief could be granted. That court granted petitioner's motion on October 15, 1970 (Appendix C). The Court of Appeals for the Seventh Circuit reversed and remanded on August 25, 1971 (Appendix B). The crux of the decision below was that Section 2(e) prohibits differences in the timeliness of a seller's delivery services, even where the difference has no direct or indirect relation to price or sales promotion and is not connected with the buyer's resale of the seller's goods.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

1. The case presents an important question of first impression concerning the scope of a key provision of the Robinson-Patman Act

During the past 35 years the Act has proved to be a regulatory measure of major importance in the sale and distribution of products in the United States. Messrs. Oppenheim and Weston in their recent treatise state:[3]

> "The Robinson-Patman Act's complex prohibitions against price and service discriminations constantly confront every large and small enterprise doing interstate business with difficult problems of compliance. Therefore, not only antitrust specialists, but also the general practitioners and general corporate lawyers representing these business concerns must be prepared to provide informed advice and guidance on Robinson-Patman Act problems."

3. Oppenheim and Weston, The Lawyer's Robinson-Patman Act Sourcebook (1971), Vol. I, Preface, p. vii.

The Act has been the subject of much comment,[4] critical and otherwise, but over the years its various provisions have been construed and reconciled in a manner calculated to carry out the legislative objective of eliminating unjustified price and price related forms of discrimination.

As is well known the Robinson-Patman Act was intended to correct the inadequacy of former Section 2 of the Clayton Act to prevent price discriminations.[5] It was enacted following extensive Federal Trade Commission and congressional investigations during the 1930s. The principal target was the chain stores, and the direct and indirect price advantages they enjoyed in the purchase of goods.[6] Despite much haggling and various changes in language the congressional target continued the same throughout the legislative process—namely, the elimination of certain direct and indirect price discrimination and numerous arrangements and subterfuges by which concealed indirect price discriminations were accomplished.[7]

The various sections of the Act are related and complementary. Section 2(a), the basic provision or "core" of the Act, prohibits a seller from discriminating in price between competing purchasers, but such discriminations are not unlawful if there is cost justification for the differentials or if there is not substantial injury to competition.

---

4. See references cited in Rowe, 1964 Supplement, Price Discrimination under the Robinson-Patman Act 79, and comments and citations by Mr. Justice Harlan dissenting in *F. T. C.* v. *Fred Meyer, Inc.*, 390 U. S. 341, 359, 360 (1968). It should be noted that the reason for the granting of certiorari in the *Fred Meyer* case was that it involved a key provision of the Robinson-Patman Act. (p. 343).

5. Rowe, Price Discrimination Under the Robinson-Patman Act, pp. 1-23 (1962) (hereinafter "Rowe").

6. *F. T. C.* v. *Fred Meyer, Inc.*, 390 U. S. 341, 349, 351 (1968).

7. Frederick Rowe comprehensively reviews this legislative history. Rowe, pp. 11-23; 365-72.

In contrast with Section 2(a), Sections 2(c), 2(d), and 2(e) have been described by this court as "absolute" prohibitions and are "banned outright."[8] They are known as *per se* provisions because Congress concluded that certain forms of disguised or indirect price discrimination were so oppressive and pernicious that they should be outlawed completely despite the existence of cost justification and the absence of competitive injury (which are defenses under Section 2(a)).[9]

Until the decision below, never in the 35 year history of the Act has Section 2(e) been held to apply to differences in the timeliness of delivery services,[10] or in fact to any discriminations which did not directly or indirectly affect price. The reason is that the Act in its entirety is a price discrimination law. In the case of differences in delivery services, it is only when the arrangement embodies an element of direct or indirect price discrimination (e.g., a transportation allowance or rebate) that the Act applies, and then 2(a).[11]

Contrary to the decision below, the services referred to in Section 2(e) and its companion Section 2(d)[12] were intended and have been consistently held to mean advertising and promotional services and like services to accom-

8. *F. T. C.* v. *Simplicity Pattern Co.*, 360 U. S. 55, 65, 69 (1959).

9. Rowe, p. 365.

10. This was conceded by the Court below, which described this as a "test" case. (Appendix B, p. A6.)

11. *Chicago Spring Products Co.* v. *U. S. Steel Corp.*, 371 F. 2d 428 (7th Cir. 1966), affirming 254 F. Supp. 83 (N. D. Ill. 1966).

12. These companion provisions are similarly construed. Rowe, p. 390. See *Elizabeth Arden, Inc.* v. *F. T. C.*, 156 F. 2d 132, 134 (2d Cir. 1946), *cert. denied* 331 U. S. 806 (1947); *Elizabeth Arden Sales Corp.* v. *Gus Blass Co.*, 150 F. 2d 988, 992-993 (8th Cir. 1945), *cert. denied*, 326 U. S. 773 (1945); Report of the Attorney General's National Committee to Study the Antitrust Laws, 189 (March 31, 1955).

plish the same purpose. Services other than these are outside the scope of the section.

Senator Logan, Senate Manager of the bill, concretely detailed the price related scope of 2(e). To the Senate he explained that, since outright price discrimination was prohibited, sellers devised a scheme saying, "We will make you an advertising allowance or a service allowance which will bring about a discrimination in prices." He re-emphasized the point: "Legitimate allowances for *advertising and matters of that nature* may be made; but allowances must not be made for the purpose of giving the purchaser an opportunity to buy goods *at a less price* than others similarly situated may buy them. . . . The Robinson bill . . . provides that the *allowance for services or for advertising* must be used for that purpose legitimately and cannot be used as an *instrument of price discrimination.*" 80 Cong. Rec. 6282 (1936) (Emphasis added).

Both the Senate and House Committee reports,[13] after describing the brokerage proscriptions of the Act, went on to describe the scope of Sections 2(d) and (e) (then 2(c) and (d)) as follows:

> "Still another favored medium for the granting of oppressive discriminations is found in the practice of large buyer customers to demand, and of their sellers to grant, *special allowances in purported payment of advertising and other sales-promotional services,* which the customer agrees to render with reference to the seller's products, or sometimes with reference to his business generally." (Emphasis added).

Congressman Utterback, Chairman of House Conferees, in his much-quoted statement, specifically described the full scope of Sections 2(d) and (e) (80 Cong. Rec. 9418):

---

13. Report of the Senate Committee on the Judiciary, S. Rep. No. 1502, 74th Cong. 2d Sess. 7 (1936); Report of the House Committee on the Judiciary, H. R. Rep. No. 2287, 74th Cong., 2d Sess. 15 (1936).

> "The bill prohibits the seller from paying the customer for services or facilities furnished by the latter in connection with the seller's goods unless such payment is available on proportionally equal terms to all other competing customers. *The existing evil at which this part of the bill is aimed is, of course, the grant of discriminations under the guise of payments for advertising and promotional services* which, whether or not the services are actually rendered as agreed, results in an advantage to the customer so favored as compared with others who have to bear the cost of such services themselves. The prohibitions of the bill, however, are made intentionally broader than this one sphere in order to prevent evasion in resort to others *by which the same purpose might be accomplished*, and it prohibits payment for such services or facilities whether furnished 'in connection with the processing, handling, sale, or offering for sale' of the products concerned." (Emphasis added).

In disagreement with the decision below, the Federal Trade Commission, the Attorney General's National Committee to Study the Antitrust Laws, and the text authorities concur that the full scope of Sections 2(d) and (e) are (1) advertising and promotional services and like services; (2) connected with the buyer's resale of the seller's products.

In its recent guidelines on the Robinson-Patman Act, the Federal Trade Commission reaffirmed the dual principles governing 2(d) and (e) as follows:[14]

> "Sections 2(d) and (e) of the Act deal with discriminations in the field of *promotional payments and services* made available to customers who buy for resale. Where the seller pays the buyer to perform the service,

14. 34 Fed. Reg. 8285 (1969). The Commission illustrates the type of services referred to in Section 2(e) as (p. 8286) "any kind of advertising; catalogs; demonstrators; display and storage cabinets; display materials; special packaging, or package sizes; accepting returns for credit; prizes or merchandise for conducting promotional contests."

section 2(d) applies. Where the seller furnishes the service itself to the buyer, section 2(e) applies. Both sections require a seller to treat competing customers on proportionally equal terms *in connection with the resale of the seller's products of like grade and quality.*" (Emphasis added).

The recent Supplement to the authoritative Attorney General's 1955 Report on the Antitrust Laws, concurs fully, stating:[15]

> "Sections 2(d) and 2(e) of the Robinson-Patman Act prohibit a seller from granting *promotional allowances or services* to customers unless they are available to all competing customers on proportionally equal terms. . . ."
>
> • • • • •
>
> "Two principles have developed which delineate the business practices within the scope of Sections 2(d) and 2(e). *The first principle* is that the sections are concerned *with advertising or other promotional allowances and services.* As stated in the introductory comments in the Federal Trade Commission's 1969 Guides for Advertising Allowances and Other Merchandising Payments and Services, 'Sections 2(d) and (e) of the Act deal with discriminations in the field of promotional payments and services made available to customers who buy for resale.' *The decisions of both the Commission and the courts are in general accord.*
>
> "*The second principle* is that Sections 2(d) and (e) relate to *allowances and services in connection with the resale of the seller's goods.* . . .
>
> "Allowances or payments *not connected with resale are typically associated with the initial sale by the seller to his customer and hence are cognizable under Section 2(a) of the Act, not Section 2(d) or (e).* Thus, the granting of preferential credit arrangements and discriminatory freight allowances are not

15. *Antitrust Developments*—1955-1968, pp. 147, 148, as amended, 1968-1969 Pocket Supplement, p. 23 (supplementing the Report of the Attorney General's National Committee to Study the Antitrust Laws, March 31, 1955).

within the scope of Section 2(d) or (e) because they are unrelated to resale. . . ."[16] (Emphasis added).

Frederick Rowe, in his comprehensive treatise on the Act, concurs in all respects.[17] With reference to the congressional purpose of Sections 2(d) and 2(e), he states (p. 370):

> "The legislative history contemplated that *promotional and no other arrangements were to be governed by the legal criteria* of these provisions." (Emphasis added).

Mr. Rowe sums up a review of the legislative history as follows (pp. 371-72):

> "In sum, the objective of Sections 2(d) and 2(e) was to enact a strict prohibition on *specially defined promotional arrangements* which operated to confer *concealed discriminatory benefits on favored buyers.* Such a discriminatory advantage arose if the customer received promotional payments without a quid pro quo, or which 'subsidized' the promotion of his business to the detriment of his competitors unable to secure com-

---

16. As to the necessity of the "services" "connection with resale" by the purchaser, see 37 Antitrust Law Journal p. 80; Hills. Antitrust Advisor pp. 272, 273 (1971); Rowe, pp. 107, 381. The court below erroneously concluded that the "resale connection" criterion under Section 2(e) was met because petitioner's delays in deliveries allegedly impeded respondent's construction and sale of houses. But that is not what the authorities mean by "resale connection" under 2(e)—that criterion refers to service which by nature and character is *directed to the promotion of the resale of seller's product*, i.e., the direct focus and impact is at the resale level. This is entirely different from the secondary effect resulting from failure to perform some term or condition at the original sales transaction level (e.g., specifications, warranties, product types, quantities, delivery dates, etc.). To illustrate the distinction, a form of transportation service which would be "connected with resale" subject to 2(e) would be limousine service furnished by Hines for Centex' use in transporting home buyers to look at Centex' houses. In contrast, truck deliveries of lumber to Centex in the present case were connected with and a part of the *original sales transaction* between Hines and Centex.

17. Rowe, pp. 106-107, 363-420.

> parable arrangements. On the other hand, a seller's terms of sale or concessions *not* in respect of actual or purported promotional activities were to be measured by the legal provisions governing direct or indirect discriminations in price. . . ." (Emphasis added).

Mr. Rowe states that, despite the semantic vagueness of Sections 2(d) and (e), the Act has been applied as Congress intended (p. 376):

> "Although the semantic vagueness of the statutory terms of 'services or facilities,' coupled with the stricter sanctions available under Sections 2(d) and 2(e), invites strained interpretations by FTC or private plaintiffs, the legislative purpose and governing judicial [sic] rulings confine these provisions to cooperative *promotional arrangements* between the supplier and customer *in connection* with the customer's *resale* of the particular product." (Emphasis added.)

The lower court's unprecedented expansion of this key Section of the Act to cover differences in delivery or distribution methods unrelated directly or indirectly to price and sales promotion would erroneously subject a broad new area of distribution methods and practices to rigid statutory controls.[18]

Congressman Utterback, Chairman of House Conferees, in his much cited report to the House clearly explained that it was not the intention of Congress to put industry in a distributive straightjacket even in the case of outright price discriminations. This was the reason for the defenses of insubstantial injury to competition and cost justification under Section 2(a) which provides exemption for differentials which make only due allowance for *differences* in the cost of manufacture, sale, or *delivery* resulting from the differing methods or quantities in which such commodities are sold or delivered. He emphasized that manufacturers are entitled to full protection in the use

18. See Rowe, p. 377.

and rewards of efficient methods of production and distribution. In this significant report Congressman Utterback specifically commented on the many lawful differences in delivery services (80 Cong. Rec. 9417 (1936)):

> "There is no limit to the phases of production, sale, and distribution in which such improvements may be devised and the economies of superior efficiency achieved, nor from which those economies, when demonstrated, may be expressed in price differentials in favor of the particular customers whose distinctive methods of purchase and delivery make them possible. They apply as between purchasers of materials for use in manufacture, as well as between those who purchase purely as retail or wholesale distributors. As between purchasers in equal quantities, for example, where one takes multiple store-door delivery, and the other single warehouse delivery, with consequent savings in trucking or other delivery costs to the seller, that saving may be expressed in a price differential. Or where one places a single order calling for periodic deliveries over an extended period of time, whereas the other places smaller successive orders requiring more frequent and therefore more costly salesman solicitation, such a difference in cost may be expressed in a price differential. Or where one customer, devoid of storage facilities, requires spot deliveries during the rush of the season, for which the manufacturer must produce in advance and store himself in order to make the fullest utilization of his plant capacity; while another customer orders for delivery in off seasons, handling the storage himself and saving the manufacturer that cost, such a saving may be expressed in a price differential."

It is inconceivable that Congress could have had any notion whatever that differences in delivery services to different customers which justify even substantial discriminations under 2(a) were banned outright under 2(e). *More specifically, it would be grossly incongruous for differences in delivery services which are sanctioned as cost*

defenses under 2(a) to be prohibited by the rigid proscriptions of 2(e).[19]

By applying 2(e) to simple differences in delivery, the court below opens the door to Federal regulation of the many distribution methods and practices which for valid and sound business reasons should not be required to be provided by a seller on a uniform basis to all customers. Supply or inventory conditions, equipment and handling facilities, costs, quantities, financial considerations, and many other distributive factors may call for different contractual and sales relationships between sellers and buyers which are sound and commercially desirable. For illustration, regardless of cost and other valid business reasons, and the absence of competitive injury, must marginal customers be accorded the same or proportionally equal treatment as reliable, financially sound customers of long standing with respect to allocations of materials during supply shortages; lines of credit; methods of delivery (i.e., barge, rail, truck, air); handling and loading (connected with the original sale); and speed or times of deliveries?

Moreover, the notion of "proportionally equal" treatment included in 2(e) is a price related concept and the guidelines of the F. T. C. have so viewed it. In the case of delivery differences and other non-price related terms it would appear to be impractical if not impossible to make any reasoned application of the "proportionally equal terms" provision of 2(e).

The unwarranted intrusion of 2(e) into distribution methods and practices under the lower court's decision is illustrated in the present case. Hines believes that because of supply, weather, and other conditions and circumstances, it can establish full contractual justification for its delivery

19. Similarly, it is incongruous to subject non-price related differentials in delivery to the rigorous *per se* provisions of 2(e) whereas outright price discriminations have the protection of 2(a) defenses.

performance to Centex. It would appear that these contractual justifications could not be asserted if 2(e) applies because they are not defenses under 2(e). Further, Hines believes it can establish cost justifications and absence of injury to competition but again these defenses would not be available under 2(e).[20]

This situation illustrates the drastic effect the decision below would have on distribution practices and contractual relationships. The sanctions of Section 2(e) override contractual rights. Regardless of cost justifications, absence of injury to competition, contractual defenses or other legitimate business justifications, a seller could perform or contract for different delivery or other non-price services with different competing customers only at the peril of facing 2(e) lawsuits demanding proportionally equal treatment and treble damages for alleged injuries. *This would create an impossible marketing situation and place buyers and sellers in a distributive straight-jacket entirely foreign to the objectives and purposes of legislators who thought and consistently stated that they were enacting a price discrimination law.*

We respectfully submit that the decision below is plainly wrong and would drastically regulate and restrict essential distribution practices in a broad segment of our economy by its erroneous interpretation of a key section of the Act.

2. The decision below conflicts in basic principle with decisions of this Court and with decisions of other courts of appeal.

The lower court's concept and interpretation of 2(e) conflicts in principle with the decisions of this Court and other courts which have consistently viewed Sections 2(d) and (e) as applying to advertising, promotional and like

20. *F. T. C.* v. *Simplicity Pattern Co.*, 360 U. S. 55 (1959).

allowances connected with the buyer's resale of the goods —as reviewed in Point 1 above.

In *F. T. C.* v. *Fred Meyer, Inc.*, 390 U. S. 341 (1968), this Court held that a supplier who accords promotional allowances to direct-buying retailers is required by Section 2(d) to accord them on proportionally equal terms to competing dealers who buy from wholesalers of the supplier.[21] Quoting the reports of the House and Senate Judiciary Committees (*supra*, p. 7), the Court described the practice at which 2(d) (and hence 2(e)) was aimed as "special allowances in purported payment of advertising and other sales promotional services" (p. 351).

The Court emphasized the price-related character of the services involved as follows (p. 352):

> "Congress *chose to deter such indirect price discrimination* by prohibiting the granting of *sales promotional allowances* to one customer unless accorded on proportionally equal terms to all competing customers." (Emphasis added).

In *F. T. C.* v. *Simplicity Pattern Co.*, 360 U. S. 55 (1959), this Court also had occasion to review the history and purpose of Sections 2(d) and (e) in comparison with 2(a) and held that the cost justification and absence of competitive injury are not defenses to 2(d) and 2(e) violations. The Court referred to 2(c), (d) and (e) as "absolute" prohibitions and citing the legislative history pointed out that these practices were referred to as "secret" discriminations. The Court significantly expressed the view that Congress *denied cost and non-competitive justification under 2(e) to force secret discriminations out into the open where they could be more readily detected and evalu-*

---

21. The difficulty of applying this principle of proportionally equal terms to differences in the promptness of deliveries between the seller and his own retail customers and the retail customers of the sellers wholesale customers is apparent.

ated under the economic criteria of 2(a).[22] Thus, the Court clearly viewed the discriminations proscribed by 2(e) as price related. Simple differences in delivery not related to price such as in the present case are not the kind or class of services that could be forced out into the open and evaluated as 2(a) price discriminations.[23]

Also contrary to the decision below, other courts of appeal have viewed the intended full scope of Section 2(e) as covering promotional and price related services.

In *P. Lorillard Company* v. *F. T. C.*, 267 F. 2d 439 (3d Cir. 1959), *cert. denied*, 361 U. S. 923 (1959), it was held that sellers of grocery products violated Section 2(d) by making payments to broadcasting companies for broadcasting time to be used by the sellers' chain store customers for their own advertising, with the chain stores also agreeing to feature "in store" promotional displays of the sellers' products. Such payments were not made available for the benefit of customers competing with the chain stores. The Third Circuit, relying on Representative Utterback's previously quoted statement (*supra*, pp. 7-8), stated:

> "The purpose of the section here involved was to eliminate all *discriminations under the guise of payments for advertising or promotional services, and*

22. 360 U. S. 55, 68, 68 n. 12 (1959).

23. The Court below, omitting the word "certain", reiterated this Court's statement in *Simplicity Pattern Co.* that Sections 2(c), (d) and (e) "unqualifiedly [make] unlawful certain business practices other than price discriminations." We submit that this reliance was misplaced and that this statement was not intended as broadly extending 2(e) beyond promotional and price related services. This Court's reference was to "certain" business practices and it does not appear that the Court intended to encompass more than price related and promotional services. In fact, the practices which this Court there held to be within 2(e) were exclusively promotional and price related services—i.e., catalogues, display cabinets, credit terms and concessions, and transportation costs.

> *Congress employed language that would cover any evasive methods.*" (Emphasis added).

Congressman Utterback's statement that the bill was made broader to prevent "evasion" by resort to action by which "the same purpose might be accomplished" clearly refers to *the same type of price-related discriminatory allowances* and not to services of an entirely different class or character than those described, i.e., differences in non-price related business practices, such as differences in delivery service—and *ejusdem generis* evinces this meaning.

Similarly, the Second Circuit in *American News Company* v. *F. T. C.*, 300 F. 2d 104 (2d Cir. 1962), *cert. denied*, 371 U. S. 824 (1962), holding that a buyer who knowingly induced and received disproportional promotional allowances banned by Section 2(d) is engaged in unfair competition under Section 5 of the F. T. C. Act, stated the scope and purpose of 2(d) (and hence 2(e)), as follows:

> "Section 2(d) was aimed explicitly at *promotional allowances which have the effect of price adjustments.*"

Also, in *R. H. Macy & Co.* v. *F. T. C.*, 326 F. 2d 445 (2d Cir. 1964), the Second Circuit, quoting legislative history at length, described the scope and target of 2(d) as being promotional and similar price related services and allowances (pp. 448-449). The court also cited with approval Representative Utterback's previously quoted statement that the existing evil at which 2(d) was aimed is "discrimination under the guise of payments for advertising and promotional devices."[24]

The Seventh Circuit itself (acting by a different panel) in a case closely paralleling the issues of the present case, only five years ago held that differences in delivery services (transportation allowances) were not within the scope of Section 2(e), but rather were subject only to Section 2(a).

24. 80 Cong. Rec. 9418 (1936).

Chicago Spring Products Co. v. *U. S. Steel Corp.*[25] The decision below conflicts directly in principle with its own *Chicago Spring Products* decision. In that decision the court, also citing and relying on the much-quoted statement of Congressman Utterback (*supra*, pp. 7-8), agreed, with emphasis, that the words "*by which the same purpose might be accomplished*" relate back to "the grant of discriminations under the guise of payments for advertising and promotional services" (p. 429) and expressly adopted the district judge's "well reasoned opinion" limiting 2(e) to "unlawful promotional arrangements connected with resale." (245 F. Supp. 83, 84-85).

The lower court stated that the legislative history and the cases "sometimes referred to promotional services" implying that these are merely illustrative of services covered by 2(e) (Appendix B, p. A7). We submit that the congressional and judicial references to promotional and price related services are not merely illustrative—they are definitive statements of the intended target and full scope of 2(e).

25. 371 F. 2d 428 (7th Cir. 1966), affirming 254 F. Supp. 83 (N. D. Ill. 1966).

CONCLUSION

The decision below contravenes the legislative history and the pronouncements of the F. T. C., the Attorney General's Committee, and the text authorities as to the meaning and scope of Section 2(e), and it conflicts in principle with decisions of this court and the Second and Third Circuit Courts of Appeal as to the target and scope of 2(e). The case thus presents an important question of first impression concerning the scope of a key section of the Act.

For the foregoing reasons it is respectfully requested that this petition for Writ of Certiorari be granted.

Respectfully submitted,

CHARLES B. MAHIN,
RICHARD L. REINISH,
Counsel for Petitioners.

December 10, 1971.

APPENDIX A.

ROBINSON-PATMAN ACT (15 U. S. C. § 13).

§ 13. Discrimination in Price, Services, or Facilities—Price; Selection of Customers.

(a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: *Provided, however*, That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account

thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: *And provided further*, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: *And provided further*, That nothing herein contained shall prevent price changes from time to time wherein response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

Burden of rebutting prima-facie case of discrimination.

(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-face case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however*, That nothing herein contained shall prevent a seller rebutting the prima-face case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

Payment or acceptance of commission, brokerage or other compensation.

(c) It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intemediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

Payment for services or facilities for processing or sale.

(d) It shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

Furnishing services or facilities for processing, handling, etc.

(e) It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facili-

ties connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.

Knowingly inducing or receiving discriminatory price.

(f) It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section. Oct. 15, 1914, c. 323, § 2, 38 Stat. 730; June 19, 1936, c. 592, § 1, 49 Stat. 1526.

APPENDIX B.

IN THE UNITED STATES COURT OF APPEALS

For the Seventh Circuit

SEPTEMBER TERM, 1970 — APRIL SESSION, 1971

No. 18926

CENTEX-WINSTON CORPORATION, *Plaintiff-Appellant,*

vs.

EDWARD HINES LUMBER CO., *Defendant-Appellee.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

447 F. 2d 585 (7th Cir. 1971).

Before DUFFY, *Senior Circuit Judge,* FAIRCHILD, and CUMMINGS, *Circuit Judges.*

CUMMINGS, *Circuit Judge.* This appeal involves the question whether Section 2(e) of the Robinson-Patman Act (15 U. S. C. § 13(e)) prohibits a seller from furnishing discriminatory delivery services to competing buyers. Before trebling under Section 4 of the Clayton Act (15 U. S. C. § 15), the plaintiff sought $230,000 for damages allegedly sustained by defendant's violation of Section 2(e) of the Robinson-Patman Act.

Plaintiff is a Chicago area builder and developer of homes and has its principal office in Palatine, Illinois. From 1968 to August 1969, it purchased lumber from de-

fendant to resell, after processing, in completed houses. Plaintiff alleged that from May 1968 to August 1969, defendant engaged in a continuous course of discrimination against plaintiff by consistently delivering lumber to plaintiff behind contractual schedules while delivering it to plaintiff's competitors "in preference to plaintiff." This purported discrimination in furnishing delivery services provides the basis for plaintiff's claim to damages.

The district court granted defendant's motion to dismiss the complaint on the ground that a discrimination in deliveries does not violate Section 2(e) of the Robinson-Patman Act. We reverse.

Section 2(e) of the Robinson-Patman Act provides as follows:

> "It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services of facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms."

Defendant quite accurately observes that thus far Section 2(e) of the Robinson-Patman Act has not been overtly construed to apply to differences in delivery services. To that extent, this is a test case. Rather than attempting to justify its prompter lumber deliveries to other builders, defendant rests on the contention that Section 2(e) does not apply to consistent, preferential differences in the timeliness of delivery services because (1) there are not promotional services and (2) they are not "connected with the * * * sale" of lumber by plaintiff. We cannot agree.

As to defendant's first argument, the statute covers the furnishing of "any services or facilities." We must not

construe this Section in a manner that strains its language and runs counter to the broad goals which Congress intended to effectuate. *Federal Trade Commission* v. *Sun Oil Co.*, 371 U. S. 505, 515; *Federal Trade Commission* v. *Fred Meyer, Inc.*, 390 U. S. 341, 349. As pointed out by Representative Patman, one of the authors of the legislation, Section 2(e) "is directed against discriminatory treatment of purchasers engaged in the resale of the seller's goods." Patman, *Complete Guide to the Robinson-Patman Act*, p. 140 (1963). It unqualifiedly makes unlawful business practices other than price discriminations.[1] *Federal Trade Commission* v. *Simplicity Pattern Co.*, 360 U. S. 55, 65. The House Conferees' Report states that Section 2(e) prohibits "the furnishing of any services or facilities by a seller to a buyer upon terms not accorded to all buyers on proportionally equal terms." H. R. Rep. No. 2951, 74th Cong., 2d sess. (1936), p. 7. While it is true that the legislative history of the statute and the cases thereunder sometimes describe these as promotional services or facilities,[2] consistently faster deliveries by defendant to plaintiff's competitors would obviously promote and facilitate their resales of lumber. Section 2(e) should not be confined to the conventional type of promotional services such as window displays, demonstrators, exhibits and prizes, for Section 2(d), and therefore its companion Section 2(e), was "made intentionally broader than this one sphere [payments for advertising and promotional services] in order to prevent evasion in resort to others [non-

1. For this reason, we cannot accept the district court's view that Section 2(e) applies only where a party was "differentially discriminated against as to the price of the commodity which he was purchasing."

2. Report of the Attorney General's National Committee to Study the Antitrust Laws (1955), p. 191; 1968 Supplement to said Report, pp. 147-148, and Pocket Part Supplement, p. 31; Rowe, *Price Discrimination Under the Robinson-Patman Act* (1962), pp. 364, 365, 366, 367, 368, 369, 382, 376, 377-81, and 1964 Supplement, p. 81.

advertising and non-promotional services] by which the same purpose might be accomplished * * *." 80 Cong. Rec. 9418. Section 2(e) was meant to cover "advertising, sales, and other services and facilities * * *." *Idem.* As we said of this Section in *Corn Products Refining Co.* v. *Federal Trade Commission*, 144 F. 2d 211, 219 (7th Cir. 1944), affirmed, 324 U. S. 726, "We think Congress when it forbade extension of special facilities to one purchaser not accorded to others, intended to forbid special favors to one purchaser over competitors in all cases where goods are sold and resold * * *." Moreover, in *Federal Trade Commission* v. *Simplicity Pattern Co.*, 360 U. S. 55, 60, under Section 2(e) the Supreme Court condemned Simplicity's payment of all transportation costs in connection with its business with variety stores where none was paid on its fabric-store transactions. If it was a violation of Section 2(e) for Simplicity to absorb such transportation costs, it would likewise be a violation for defendant to discriminate in the actual deliveries here.[3]

The use of the terms "processing" and "handling" in Section 2(e) also shows that Congress meant to ban the use of discriminatory practices, even though not of a typically sales promotional nature. Accordingly, in its 1969 guidelines on the Robinson-Patman Act, after referring to promotional payments and services, the Federal Trade Commission stated that Section 2(e) applies to the seller of products in interstate commerce if he either directly or through an intermediary furnishes services or facilities to a customer who competes with any other customer in the resale of the seller's product of like grade and quality. The examples provided are not confined solely to promotional

3. In *Sano Petroleum Corp.* v. *American Oil Co.*, 187 F. Supp. 345 (E. D. N. Y. 1960) and *United Banana Co., Inc.* v. *United Fruit Co.*, 245 F. Supp. 161 (D. Conn. 1965), affirmed, 362 F. 2d 849 (2d Cir. 1966), two district courts implied that delivery services were within the ambit of Section 2(e).

matters, and the Commission took care to explain that the list was not meant to cover every situation. 1 CCH Trade Regulation Reporter ¶ 4063, pp. 6094-6096 (1969).

As to defendant's second argument, the statute does only prohibit the furnishing of discriminatory services or facilities "connected with the processing, handling, sale, or offering for sale" of a commodity.[4] However, a discrimination in the furnishing of deliveries would impede the resale of the commodity, as alleged in this complaint. It cannot be persuasively said that the continuous and consistent variances in these delivery times were not connected with the resale of the lumber within the meaning of Section 2(e).[5] We therefore reject *Secatore's, Inc.* v. *Esso Standard Oil Co.*, 171 F. Supp. 665, 668 (D. Mass. 1959), to the extent that it may be inconsistent herewith.

Defendant's argument that its business would suffer if Section 2(e) were applied to discriminatory deliveries was answered in *Federal Trade Commission* v. *Simplicity Pattern Co.*, 360 U. S. 55. After noting that one of the purposes of Section 2(e) was to condemn secret discriminations, the Supreme Court pointed out that the courts are not in a position to review the economic wisdom of Congress, which apparently intended to force sellers "to confine their discriminatory prices to price differentials, where they can

4. Rowe, *op. cit.*, pp. 372, 376, 381-385; Millstein, "Sections 2(d) and (e) Robinson-Patman Act—Compulsory Universal Reciprocity." 37 Anti-trust Law Journal 77, 80 (1967).

5. Defendant's principal reliance is on *Chicago Spring Products Co.* v. *United States Steel Corp.*, 254 F. Supp. 83 (N. D. Ill. 1966), affirmed, 371 F. 2d 428 (7th Cir. 1966). As the district court stated, that case is "not applicable or helpful here," for it dealt with freight allowances or rebates which come within the ban of Section 2(a) rather than Section 2(e). It would be incongruous to hold such price differentials also to be within Section 2(e), for "Congress intended to strike down freight discriminations which are an element of 'price' *only* when those discriminations have an adverse effect on competition or cannot be cost justified as provided for in section 2(a)." 254 F. Supp. at p. 85.

be more readily detected and where it would be much easier to make accurate comparisons of any alleged cost savings." 360 U. S. at pp. 67, 68.

Our decision that Section 2(e) covers discriminatory differences in deliveries does not necessarily carry the day for plaintiff. For the statute to be applicable, the favored customers must be competitors of the plaintiff. *Federal Trade Commission* v. *Simplicity Pattern Co.*, 360 U. S. 55, 62-63. On remand, defendant may be able to justify the differences in delivery, if any, under the meeting competition defense contained in Section 2(b), which applies to a charge of violating Section 2(e) and eliminates defendant's bogeyman, the stifling of competition. *Federal Trade Commission* v. *Simplicity Pattern Co.*, 360 U. S. 55, 67; *Shulton, Inc.* v. *Federal Trade Commission*, 305 F. 2d 36 (7th Cir. 1962); *Exquisite Form Brassiere Inc.* v. *Federal Trade Commission*, 301 F. 2d 499 (D. C. Cir. 1961), certiorari denied, 369 U. S. 888. Furthermore, defendant may be able to show that it had not actually adopted any delivery plan that discriminated against plaintiff, or that the discriminations were so *de minimis* or spasmodic that they were not within the ban of the statute. The seller need only make its services and facilities available to its customers in proportion to the capacity of each customer to participate in or employ the advantage. *Federal Trade Commission* v. *Simplicity Pattern Co.*, 360 U. S. 55, 61-62, n. 4; Rowe, *op. cit.*, pp. 371-372, 404-405, 408; 80 Cong. Rec. 9418. Thus to avoid the applicability of Section 2(e) to preferential differences in delivery times, sellers can formulate and announce delivery plans that will satisfy the "proportionally equal terms" requirement of the statute. See Patman, *Robinson-Patman Act*, p. 89 (1938). Indeed, this defendant may be able to show that its deliveries to

plaintiff and its competitors satisfied that requirement. See Rowe, *op. cit.*, pp. 399-414.[6]

If plaintiff can prove the allegations of its complaint, it would have a state court remedy for breach of contract. But this does not mean there is no federal remedy under Section 2(e) if it can prove damage from the alleged continuous course of discrimination against it by the consistent grant of preferential delivery services to its competitors by defendant.[7]

Reversed and remanded.

---

6. Even plaintiff concedes that it must prove the following in order to prevail:

> "Plaintiff has the burden of showing that it competed with other builders and developers who allegedly received favorable deliveries. Plaintiff must also show that defendant's sales to it and its competitors were reasonably contemporaneous, and involved goods of like grade and quality. Moreover, plaintiff must show not merely that its competitors received lumber in preference to plaintiff but that defendant did not make such deliveries available to it on a basis 'proportionally equal' to its competitors. Finally, under Section 4 of the Clayton Act (15 U. S. C. § 15), plaintiff must show that it was injured in its business and property by the discrimination." (Reply brief, pp. 16-17; footnotes omitted.)

7. See *Henry G. Meigs, Inc.* v. *Empire Petroleum Company*, 273 F. 2d 424, 431 (7th Cir. 1960).

APPENDIX C.

[C19] IN THE UNITED STATES DISTRICT COURT.
(Caption—Civil Action No. 70 C 808)

MEMORANDUM OPINION AND ORDER

The defendant, Edward Hines Lumber Co., has brought a motion to dismiss the complaint filed by the plaintiff, Centex-Winston Corporation.

The complaint alleges that the plaintiff is a retailer and jobber to construction sites of lumber which it purchases from the defendant. The complaint alleges that the defendant knowingly and willfully delays its shipment of lumber to the plaintiff so that the plaintiff is disadvantaged in its deliveries to its customers. Since the delays of shipment of lumber allegedly are only to the plaintiff and not the other customers of the defendant, some of whom are competing with the plaintiff, the plaintiff is further disadvantaged and injured in its business relations with its customers.

The complaint alleges this is discrimination under Section 2(e) of the Robinson-Patman Act [15 U. S. C. § 13(e)]. The defendant has moved to dismiss the complaint on the grounds that the only cause of action here is that of contract rather than a violation of the antitrust laws.

This point has been extensively briefed and thoroughly researched by the able counsel for both parties. For their assistance in this matter, I am very grateful.

[C20] The parties have cited a variety of cases, each claiming to show that the words of Section 2(e) of the Robinson-Patman Act apply to this situation. I note that

some of the cases are cited by both parties to prove their respective points. Also cited are the comments of the legislators who wrote the bill, as well as the comments of the learned expert Frederick Rowe, the most eminent scholar in the field.

After a full and careful review of the complaint, the statute itself, the legislative history, and the comments of the learned expert, I am of the opinion that nothing either party cites is particularly applicable to the situation here.

Section 2(e) of the Robinson-Patman Act reads as follows:

> "It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms."

Both parties have tried very hard to show that a delay in delivery either is or is not a "service" within the meaning of the statute. The cases cited by the parties show that the emphasis on the word is misplaced. Rather it is the word "term" on which we should focus our attention. While the word is employed often and loosely to connote general contractual "conditions," *Shawnut Ass'n.* v. *Securities and Exchange Com'n.*, 146 F. 2d 791 (1st Cir. 1945), I am of the opinion that in the manner in which it is employed, based upon the authorities cited by the plaintiff and the defendant, in particular: Rowe, Price Discrimination Under the Robinson-Patman Act, FTC Guidlines, 34 Fed. Reg. 8285 (1969); *American Can Co.* v. *Russellville Canning Co.*, 191 F. 2d 38 (8th Cir. 1951);

Sano Petroleum Corp. v. *American Oil Co.*, 187 F. Supp. 345 (E. D. N. Y. 1960). (I do not feel that the cases in the Seventh Circuit, especially that of *Chicago Spring Products Co.* v. *U. S. Steel Corp.*, 254 F. Supp. 83 (N. D. Ill. 1966) are applicable or helpful here) the word "term" is used here to connote "price and condition of *payment*." None of the cases cited by plaintiff shows a situation where the party was not deferentially discriminated against as to the *price* of the commodity which he was purchasing. Here we have no allegation of price discrimination, but rather one of late delivery which, although [C21] it does not discriminate as to price of goods, does hinder the plaintiff in effectively competing.

After a careful study of these authorities, as well as independent research of my own, I am convinced that the action entertained here does not properly qualify under the Robinson-Patman Act. Therefore, the complaint should be dismissed. The statements made above shall constitute my findings of fact and conclusions of law.

For the reasons contained in the above opinion, the motion of the defendant to dismiss for failure to state a claim under Rule 12(b) of the Federal Rules of Civil Procedure is allowed and it is hereby ordered, adjudged and decreed that the complaint be and the same hereby is dismissed.

ENTER:

/s/ JAMES B. PARSONS,
United States District Judge.

Date: October 15, 1970.

[C22-C28] * * *

APPENDIX D.

[C4] IN THE UNITED STATES DISTRICT COURT.
* * (Caption—Civil Action No. 70 C 808) * *

COMPLAINT

Now comes Centex-Winston Corporation, a Nevada corporation, formerly Winston Development Corporation, an Illinois corporation, by its attorneys Jerome H. Gerson, Daniel N. Epstein, Jerome H. Torshen and Lawrence H. Eiger, and complaining of the defendant, Edward Hines Lumber Co., a Delaware corporation, states as follows:

1. This Complaint is filed and these proceedings are instituted under Section 4 of the Act of Congress of October 15, 1914 (15 U. S. C. § 15), commonly known as the Clayton Act, to recover damages for injury to the business and property of plaintiff sustained by reason of violations [C5] by defendant, as hereinafter alleged, of Section 2(e) of said Act as amended by the Act of Congress of June 19, 1936 (15 U. S. C. § 13(e)) commonly known as the Robinson-Patman Act.

2. This court has jurisdiction of the subject matter of this complaint under 28 U. S. C. § 1337.

3. Plaintiff is a corporation organized and existing under the laws of the State of Nevada with principal offices in Palatine, Illinois. Plaintiff is the successor to Winston Development Corporation, an Illinois corporation, with respect to the matters alleged in this complaint. Plaintiff is engaged in the business of developing large tract single family residential communities and apartment projects in the Chicago metropolitan area and the building of single family residences and condominium apartments thereon.

Plaintiff competes with other builders and developers of homes in the Chicago metropolitan area.

4. Defendant Edward Hines Lumber Company is a Delaware corporation, with principal offices in Chicago, Illinois. Defendant is a fully integrated producer, [C6] fabricator, wholesaler and retailer of dimensional lumber, plywood, trusses, millwork and related wood building products, (hereinafter referred to collectively as "lumber").

5. Defendant mills and fabricates lumber from timber grown by it and other producers in states other than the State of Illinois. Said lumber moves in a continuous stream of interstate commerce from forests and production facilities outside the State of Illinois through defendant as a conduit to plaintiff and other builders and developers in the Chicago area who resell such lumber as components such as roofing, wall framing, decking, siding and interior trim in completed houses.

6. During all of 1968 and prior to August, 1969, plaintiff and its agents purchased lumber from defendant for resale pursuant to contracts entered into between the parties during 1968 and the first six months of 1969. Lumber was shipped by defendant in interstate commerce in response to plaintiff's requests for delivery pursuant to the aforementioned contracts. The lumber thus purchased from defendant was sold by plaintiff after processing as components in finished homes.

[C7] 7. Builders and developers such as plaintiff rely upon deliveries of lumber to enable them to resell such lumber in completed homes. During the period described in Paragraph 6 above, plaintiff scheduled its orders to defendant for delivery of lumber in such a manner as to facilitate the sale and delivery of completed houses.

8. Beginning in May, 1968, and continuing thereafter until August, 1969, defendant, in violation of Section 2(e)

of the Clayton Act, as amended by the Robinson-Patman Act, engaged in a continuous course of discrimination against plaintiff with respect to the furnishing of delivery services to plaintiff, in that defendant consistently delivered lumber behind the agreed upon schedules to plaintiff while delivering like goods to builder developer competitors of plaintiff in the Chicago metropolitan area in preference to plaintiff.

9. By virtue of defendant's discrimination in furnishing the aforementioned delivery services, plaintiff was injured in its business and property in diverse ways including, but not limited to the following:

[C8] a. Plaintiff was unable to meet certain of its promised deliveries of completed houses in which defendant's lumber was to be resold as a component.

b. Plaintiff was required to purchase other lumber for resale as components in its houses in order to attempt to meet its delivery commitments to home and apartment purchasers.

c. Plaintiff's cost of construction were vastly increased by the delays in delivery which forced it to expend great sums which, but for defendant's discriminatory conduct, would have been unnecessary.

d. Plaintiff's good will and its competitive position among developers and builders in the Chicago metropolitan area were injured by its inability to maintain delivery and production schedules.

Wherefore, plaintiff, Centex-Winston Corporation, [C9] prays for judgment in the amount of $230,000, said amount to be trebled in accordance with the provisions of Section 4 of the Clayton Act, and the costs of suit, including reasonable attorney's fees.

[C10-C13] * * *

APPENDIX E.

[C14] IN THE UNITED STATES DISTRICT COURT
(Caption—Civil Action No. 70 C-808)

MOTION OF DEFENDANT TO DISMISS THE COMPLAINT FOR FAILURE TO STATE A CLAIM UNDER RULE 12(b)

(Filed April 29, 1970)

Defendant, Edward Hines Lumber Co. moves the Court pursuant to Rule 12(b) of the Federal Rules of Civil Procedure for an order dismissing the claims of the Plaintiff for failure to state a claim upon which relief may be granted.

As grounds for its motion, Defendant states that the allegations that it engaged in a continuous course of discrimination against Plaintiff by delivering lumber behind the agreed upon schedules while delivering like goods to other builder-developers does not establish any violation of Section 2(e) of the Clayton Act as amended by the Act of Congress of June 19, 1936 (15 USC § 13(e)) commonly known as the Robinson-Patman Act.

[C15] Wherefore, Defendant prays for an order dismissing the claim of the Plaintiff.

[C16-C18]

APPENDIX F.

CIRCUIT COURT OF COOK COUNTY, ILLINOIS

County Department—Chancery Division

EDWARD HINES LUMBER CO., a Delaware Corporation, *Plaintiff-Counter-Defendant,* vs. CENTEX CORPORATION, a Nevada Corporation, *Defendant-Counter-Plaintiff.*	No. 69 CH 4709 And Related Cases

SUMMARY JUDGMENT ORDER

Plaintiff Edward Hines Lumber Co. having moved pursuant to Section 57(1) of the Civil Practice Act for summary judgment in its favor on Count II of the Complaint against Defendant Centex Corporation (formerly Winston Development Corporation), the Court having examined the pleadings, supporting Affidavits and Counter-Affidavits on file, and having considered the arguments of counsel for both parties, the Court finds that there is no genuine issue as to any material fact and that Plaintiff is entitled to a judgment in its favor as a matter of law on Count II.

The Court further finds, pursuant to Supreme Court Rule 304(a) that there is no just reason for delaying enforcement or appeal of this Order. Accordingly,

IT IS HEREBY ORDERED that judgment be entered in favor of Edward Hines Lumber Co. against Centex Corporation in the following total amount:

Item		Amount
Indebtedness		$138,332.90
Court Costs:		
DuPage County Filing Fees (30 cases)	$ 930.00	
DuPage County Lis Pendens Notices (30 cases)	90.00	
DuPage County Sheriff's Fees (28 cases)	669.04	
Cook County Filing Fees (107 cases)	3,317.00	
Cook County Lis Pendens Notices (105 cases)	525.00	
Cook County Torrens Notices (2 cases)	26.00	
Cook County Sheriff's Fees	2,244.42	
Total Costs:		7,801.46
Total Judgment Amount		$146,134.36

ENTER:

/s/ D. A. COVELLI,
Circuit Judge.

Dated: July 21, 1970.

We approve the above Order as to form.

/s/ PRICE, CUSHMAN, KECK & MAHIN

Price, Cushman, Keck & Mahin
134 South LaSalle Street
Chicago, Illinois 60603
Randolph 6-9000
Attorneys for Plaintiff,
Edward Hines Lumber Co.

Jerome H. Torshen, Ltd.
11 South LaSalle Street
Chicago, Illinois 60603
372-9282
Attorneys for Defendant,
Centex Corporation

APPENDIX G.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

Monday, September 13, 1971.

HON. F. RYAN DUFFY, *Senior Circuit Judge*
HON. THOMAS E. FAIRCHILD, *Circuit Judge*
HON. WALTER J. CUMMINGS, *Circuit Judge*

CENTEX-WINSTON CORPORATION, *Plaintiff-Appellant,* vs. EDWARD HINES LUMBER CO., *Defendant-Appellee.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 18926

IT IS ORDERED by the Court that the petition for reconsideration on behalf of defendant-appellee, Edward Hines Lumber Co., filed herein on September 8, 1971, be and the same is hereby denied.

Supreme Court, U.S.
FILED
JAN 8 1972
E. ROBERT SEAVER, CLERK

No. 71-762

In the

Supreme Court of the United States

OCTOBER TERM, 1971

EDWARD HINES LUMBER CO.,
a Delaware corporation,

Petitioner,

vs.

CENTEX-WINSTON CORPORATION,
a Nevada corporation,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

JACK JOSEPH
69 W. Washington Street
Chicago, Illinois 60602
JEROME H. GERSON
DANIEL N. EPSTEIN
120 W. Madison Street
Chicago, Illinois 60602
JEROME H. TORSHEN
LAWRENCE H. EIGER
11 S. La Salle Street
Chicago, Illinois 60603
Attorneys for Respondent

YACKER, GERSON & EPSTEIN
JEROME H. TORSHEN, LTD.
Of Counsel

The Scheffer Press, Inc.—ANdover 3-6850

INDEX

	PAGE
OPINION BELOW	2
JURISDICTION	2
QUESTION PRESENTED	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT	2
ARGUMENT	4
I. The Court Below Correctly Relied on the Plain Meaning of the Language of Section 2(e)	4
II. The Decision of the Court Below is Not Inconsistent or in Conflict With the Decisions of This Court or Other Courts	7
CONCLUSION	12

TABLE OF CASES

American News Company v. Federal Trade Commission, 300 F.2d 104 (2d Cir., 1962), cert. denied, 371 U.S. 824 (1962)	7
Chicago Spring Products Co. v. United States Steel Corp., 254 F.Supp. 83 (N.D.Ill., 1966) aff'd, 371 F.2d 428 (7th Cir., 1966)	9
Federal Trade Commission v. Fred Meyer, Inc., 390 U.S. 341, 349 (1968)	4, 7, 8
Federal Trade Commission v. Simplicity Pattern Co., 360 U.S. 55 (1959)	7, 8, 9
Georgia v. Evans, 316 U.S. 159, 162-163 (1942)	4
Edward Hines Lumber Co. v. Centex-Winston Corporation, 447 F.2d 585 (7th Cir., 1971)	2
Edward Hines Lumber Co. v. Centex-Winston Corporation, Civil Action No. 70 C 808 (1970, unpublished)	2
In the Matter of American Greetings Corp., 49 FTC 446, 450 (1953)	8

PAGE

In the Matter of Appleton-Century-Crofts, Inc., 47 FTC 1371, 1375-76 (1951) 8

In the Matter of General Foods Corporation, 52 FTC 798 (1956) 8

In the Matter of Joseph A. Kaplan & Sons, Inc., 63 FTC 308, 1331-32 (1960), aff'd and modified, 347 F.2d 785 (D.C.Cir., 1965) 8

In the Matter of Luxor, Ltd., 31 FTC 658 (1940) 8

P. Lorillard Company v. Federal Trade Commission, 267 F.2d 439 (3d Cir., 1959), cert. denied, 361 U.S. 923 (1959) 7

R. H. Macey & Co. v. Federal Trade Commission, 326 F.2d 445 (2d Cir., 1964) 7

Schweggmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 388 (1951) 4

Sun Oil Co. v. Federal Trade Commission, 371 U.S. 505, 515 (1963) 4

United States v. Cooper Corp., 341 U.S. 600, 605 (1941) 4

STATUTES

Section 2(a), Robinson-Patman Act, (15 U.S.C. §13(a)) 6, 9

Section 2(b), Robinson-Patman Act, (15 U.S.C. §13(b)) 6, 7, 11

Section 2(c), Robinson-Patman Act, (15 U.S.C. §13(c)) 6

Section 2(d), Robinson-Patman Act, (15 U.S.C. §13(d)) 6, 8

Section 2(e), Robinson-Patman Act, (15 U.S.C. §13(e)) 2, 3, 4, 5, 6, 7, 8, 9, 10, 11

LEGISLATIVE AND OTHER AUTHORITIES

80 Cong. Rec. p. 9418, June 15, 1936 6

Federal Trade Commission Guidelines, 1 CCH Trade Reg. Rep. ¶4003 8

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-762

EDWARD HINES LUMBER CO.,
a Delaware corporation,

Petitioner,

vs.

CENTEX-WINSTON CORPORATION,
a Nevada corporation,

Respondent.

On Petition For Writ Of Certiorari To The
United States Court Of Appeals For The Seventh Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

To the Honorable Chief Justice of the United States and the Associates Justices of the Supreme Court of the United States:

The respondent, Centex-Winston Corporation, respectfully prays that this Court deny the Petition for a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on August 25, 1971.

OPINION BELOW

The opinion of the Court of Appeals, 447 F.2d 585 (7th Cir., 1971) and the opinion of the District Court, Civil Action No. 70 C 808 (1970, unpublished), appear in the Appendix to the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Whether Section 2(e) of the Robinson-Patman Act (15 U.S.C. §13(e)) prohibits discriminations in the furnishing of delivery services and facilities in connection with the processing, handling, sale or offering for sale of a commodity.

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Robinson-Patman Act are set forth in the Petition at p. 2 and in the Appendix thereto at pp. A1-A4.

STATEMENT

Petitioner has failed to set forth the essential allegation of the complaint which the court below held state a cause of action under Section 2(e) of the Robinson-Patman Act. The complaint alleges that respondent is a builder and developer of single and multiple family residential projects in the Chicago metropolitan area and competes therein with other builder-developers. Petitioner is a fully integrated producer, fabricator, wholesaler and retailer of lumber products which move in interstate commerce from forests and production facilities

outside Illinois via petitioner as a conduit to respondent and other builder-developers in the Chicago metropolitan area.

The complaint further alleges that builders and developers such as respondent rely upon lumber deliveries to enable them to resell such lumber in completed homes; that from May, 1968 through August, 1969 petitioner, in violation of Section 2(e), continuously discriminated against respondent by delivering lumber behind the agreed upon schedules to it while delivering like goods to respondent's competitors in preference to respondent, and that by virtue of such discrimination, respondent was injured in its business and property.

Petitioner's reference to the proceedings in the Circuit Court of Cook County (Pet. p. 3) is both misleading and irrelevant. Respondent's voluntary dismissal of the counterclaim in that court, pursuant to an agreement with petitioner, specifically states that it is without prejudice to respondent's right to proceed against petitioner.

ARGUMENT

I. The Court Below Correctly Relied on the Plain Meaning of the Language of Section 2(e)

The decision of the court below is compelled by the clear language of the Robinson-Patman Act and employs principles of statutory construction consistently applied to the federal antitrust statutes. This Court has repeatedly held that the words of the statutes are to be taken in their usual and customary meaning and that the courts can not engraft thereon limitations or restrictions which Congress did not see fit to include. *Federal Trade Commission* v. *Fred Meyer, Inc.*, 390 U.S. 341, 349 (1968); *Sun Oil Co.* v. *Federal Trade Commission*, 371 U.S. 505, 515 (1963); *Schweggmann Bros.* v. *Calvert Distillers Corp.*, 341 U.S. 384, 388 (1951); *Georgia* v. *Evans*, 316 U.S. 159, 162-163 (1942); *United States* v. *Cooper Corp.*, 341 U.S. 600, 605 (1941).

The court below found the provisions of Section 2(e) to be written in plain and unambiguous language. Section 2(e) covers the furnishing of "any services or facilities connected with the processing, handling, sale or offering for sale" of a commodity other than on "proportionally equal terms." The words of the statute demonstrate its scope. The language does not include or even suggest that (as petitioner urges) only discriminations in price or those concerning advertising and promotional allowances are within the statutory prohibitions.

Had Congress sought to limit Section 2(e) to price discriminations or discriminations in the furnishing of advertising and promotional services, it could have done

so in a few words or a single phrase. The very language of the statute, however, indicates that such was not the purpose of Congress.

One of the most prominent discriminatory abuses before the Congress in 1936 was the use of "advertising allowances" as a disguise for price discriminations. It was not, as petitioner urges, the *only* discrimination with which Congress was concerned. The draftsmen of the Robinson-Patman legislation recognized that the variety in forms of discrimination was limited only by the ingenuity of the sellers and their favored customers. The Robinson-Patman bill was therefore phrased in language broad enough to cover not merely "advertising" or "promotional" services, but all other forms of discriminations in services and facilities relating to handling, processing and sale. The court below correctly stated:

> "The use of the terms 'processing' and 'handling' in Section 2(e) shows that Congress meant to ban the use of discriminatory practices, even though not of a typically sales promotional nature." (147 F.2d at 588)

The court below summarized the legislative history as follows:

> "Section 2(e) should not be confined to the conventional type of promotional services such as window displays, demonstrators, exhibits and prizes, for Section 2(d), and therefore its companion Section 2(e) was *'made intentionally broader than this one sphere [payments for advertising and promotional services] in order to prevent evasion in resort to others [non-advertising and non-promotional services] by which the same purpose might be accomplished* * * *.'" 80 Cong.Rec. 9418. Section 2(e)

> was meant to cover advertising, sales, and other services and facilities * * *" Idem." (447 F2d at 587, emphasis supplied)

With equal clarity, the Congressional draftsmen demonstrated that Section 2(e) was not to be limited merely to price and price related discriminations. The phrase "proportionally equal terms" found in Section 2(e) was defined by Congressman Utterback as follows:

> "The bill also prohibits the seller from furnishing services or facilities to the purchaser in connection with the processing, handling, or sale of the commodities concerned unless they are accorded to all purchasers on proportionally equal terms. Again the last phrase has reference to the several purchasers' equipment and ability to satisfy the terms upon which the offer is made, or the services, or the facilities furnished to any other purchases." (80 Cong.Rec. p. 9418, June 15, 1936)

It would be incongruous to assume that Congress, having devoted three sections (Sections 2(a), 2(c) and 2(d)) to price and price-related discriminations would deliberately enact yet a fourth section to cover the same ground as the first three, but would fail to include in that fourth section any restrictive language to accomplish that which petitioner argues was the Congressional purpose.

Finally, the language of Section 2(b) of the Act demonstrates that both price and non-price discriminations were within the contemplation of Congress. Section 2(b) gives the seller the right to rebut a *prima facie* case of discrimination by showing that it acted in good faith to meet competition. This defense is provided with respect to both price and nonprice discriminations. Section 2(b) provides in pertinent part:

"Provided, however, that nothing herein contained shall prevent a seller rebutting the *prima facie* case thus made by showing that his lower price *or the furnishing of services or facilities to any purchaser* or purchasers was made in good faith to meet an equally low price competitor, *or the services or facilities furnished by a competitor.*" (Emphasis supplied)

Clearly, were only price related discriminations within the scope of Section 2(e), it would be unnecessary for Section 2(b) to refere to both "price" and "services or facilities".

II. The Decision of the Court Below is Not Inconsistent or in Conflict With the Decisions of This Court or Other Courts.

Petitioner relies for support on decisions of this Court and lower courts which considered discriminations in advertising and promotional allowances.* Relying upon out of context quotations, petitioner concludes that the decisions restrict Section 2(e) to advertising and promotional services and facilities. However, each of petitioners' decisions dealt specifically with discriminations in the area of advertising and promotion, and therefore employed language to address the problem in that area. In none of those decisions did this Court or any other court hold, as

---

* *Federal Trade Commission* v. *Fred Meyer, Inc.*, 390 U.S. 341 (1968); *Federal Trade Commission* v. *Simplicity Pattern Co.*, 360 U.S. 55 (1959); *P. Lorillard Company* v. *Federal Trade Commission*, 267 F.2d 439 (3d Cir., 1959), cert. denied, 361 U.S. 923 (1959); *American News Company* v. *Federal Trade Commission*, 300 F.2d 104 (2d Cir., 1962), cert. denied, 371 U.S. 824 (1962); *R. H. Macey & Co.* v. *Federal Trade Commission*, 326 F. 2d 445 (2d Cir., 1964).

petitioner urges, that *only* advertising and promotional discrimination are within the prohibitions of Section 2(e).*

Petitioner also urges that this Court in *Simplicity Pattern* and *Fred Meyer*** limited the scope of 2(e) to price and price related discriminations. *Fred Meyer*, however, dealt specifically with discriminations in the form of advertising allowances under Section 2(d) and, in *Simplicity Pattern*, this Court specifically stated:

> "Subsections (c), (d), and (e), on the other hand, unqualifiedly make unlawful certain business practices other than price discriminations." (360 U.S. at 65).

---

* Petitioner has similarly misconstrued the 1969 FTC Guidelines by neglecting to include in its quotation therefrom that part of the Guidelines which states: "They are not meant to cover every situation." Petitioner similarly excludes the Guidelines' own examples which include references to "special packaging or package size" and "accepting returns for credit", both clearly outside the realm of advertising and promotion (1 CCH Trade Reg. Rep. ¶4003). The Federal Trade Commission, in holding that discriminations in package sizes and accepting returns for credit violate Section 2(e), demonstrated that the Section is not limited to services directly involved in the promotion of the resale of the seller's product. Like the deliveries of lumber, package size and returns for credit may be associated with the original sale transaction between the supplier and customer. However, they are connected with and affect the ability of the customer to handle, process and resell the goods. *In the Matter of General Foods Corporation*, 52 FTC 798 (1956); *In the Matter of Luxor, Ltd.*, 31 FTC 658 (1940); *In the Matter of Appleton-Century-Crofts, Inc.*, 47 FTC 1371, 1375-76 (1951); *In the Matter of American Greetings Corp.*, 49 FTC 446, 450 (1953); *In the Matter of Joseph A. Kaplan & Sons, Inc.*, 63 FTC 308, 1331-32 (1960), *aff'd and modified*, 347 F.2d 785 (D.C.Cir., 1965).

** *Federal Trade Commission* v. *Simplicity Patterns*, 360 U.S. 551 (1959); *Federal Trade Commission v. Fred Meyer, Inc.*, 390 U.S. 341 (1968).

Similarly, petitioner misconstrues the decisions of the District Court and the Court of Appeals in *Chicago Spring Products Co.* v. *United States Steel Corp.*[***] as holding that differences in delivery services are not within the scope of Section 2(e) but are subject only to Section 2(a). That case, as the court below correctly stated, dealt not with delivery services, but with freight allowances and rebates which, by specific statutory language, are within the scope of Section 2(a).

Petitioner attempts to buttress its petition by urging that a host of dire effects will befall both it and distributive practices in general if industry cannot freely discriminate among its customers in furnishing delivery services. Petitioner foresees great harm if customers sue their suppliers under Section 2(e) ". . . demanding proportionally equal treatment and treble damages for alleged injuries." (Pet. 14) Because the "cost justification" and "injury to competition" defenses in price discrimination cases under Section 2(a) are not similarly available under Section 2(e), petitioner urges that application of the latter section to delivery services will "create an impossible marketing situation." (Pet. 14).

The court below, which considered this parade of distributive horribles viewed, the situation with considerably less alarm than petitioner. The court, relying upon *Simplicity Pattern,* stated:

> "Defendant's argument that its business would suffer if Section 2(e) were applied to discriminatory deliveries was answered in *Federal Trade Commission* v. *Simplicity Pattern,* 360 U.S. 55. After

*** 254 F.Supp. 83 (N.D.Ill., 1966), *aff'd* 371 F.2d 428 (7th Cir., 1966).

> noting that one of the purposes of Section 2(e) was to condemn secret discriminations, the Supreme Court pointed out that courts are not in a position to review the economic wisdom of Congress, which apparently intended to force sellers 'to confine their discriminatory practices to price differentials, where they can be more readily detected and where it would be much easier to make accurate comparisons of any alleged costs savings' 360 U.S. pp. 67, 68" (447 F.2d at 588)

The decision of the lower court is supported not only by the statutory language and legislative history but by economic reality as well. The scope of Section 2(e) is not limited to price and price related discriminations in advertising and promotion because the methods of discrimination in marketing are not so limited. As stated by the court below:

> ". . .a discrimination in the furnishing of deliveries would impede the resale of the commodity as alleged in this complaint. It cannot be persuasively said that the continuous and consistent variances in these delivery times were not connected with the resale of the lumber within the meaning of Section 2(e)." (447 F.2d at 588)

Obviously, a supplier could charge all of his customers the same price and give each proportionately equal advertising and promotional allowances or services, and still, by discriminating in delivery services, work the most serious harm to disfavored customers in their resale of supplier's goods. Thus, for example a supplier of turkeys could charge an identical same price to all of its retail grocer customers and provide them with advertising on a proportionally equal basis. But if the supplier delivered turkeys to a supermarket on the Monday before

Thanksgiving and to a small grocer on Friday, there would be an obvious effect on the latter's turkey sales regardless of price or advertising benefits. Similarly, if a publisher provides all of its bookstore customers with the same advertising and promotional material for a new bestseller, but delivers the book to some dealers two weeks after it has been released to others, the saleability of the book in the hands of disfavored dealers is vastly diminished.

Moreover, petitioner will not be defenseless of the 2(e) is applied to delivery service discriminations. As the court below recognized, petitioner may be able to show that it did not actually discriminate or that its discriminations were *de minimus*. Petitioner may also escape liability if it can show that its services were available to respondent on terms proportionately equal to other builder developers or that (under Section 2(b)) it acted in good faith to meet competition. Bacause these latter issues can be resolved only by trial, the Petition herein is premature. If this Court is to consider the application of Section 2(e) to delivery services, it ought to do so on a record of evidence in the trial court rather than on a motion to dismiss the complaint. Moreover, the successful assertion of the foregoing defenses might obviate the necessity for a hearing by this Court as to the application of Section 2(e) to discriminations in delivery services.

CONCLUSION

By virtue of the foregoing, Respondent respectfully prays that this Petition for a Writ of Certiorari be denied.

Respectfully submitted,

JACK JOSEPH
69 W. Washington Street
Chicago, Illinois 60602

JEROME H. GERSON
DANIEL N. EPSTEIN
120 W. Madison Street
Chicago, Illinois 60602

JEROME H. TORSHEN
LAWRENCE H. EIGER
11 S. La Salle Street
Chicago, Illinois 60603
Attorneys for Respondent

YACKER, GERSON & EPSTEIN
JEROME H. TORSHEN, LTD.
Of Counsel

JAN 14 1972
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971.

No. 71-762

EDWARD HINES LUMBER CO.,
A DELAWARE CORPORATION,
Petitioner,

vs.

CENTEX-WINSTON CORPORATION,
A NEVADA CORPORATION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITIONER'S REPLY MEMORANDUM.

CHARLES B. MAHIN,
RICHARD L. REINISH,
JONATHAN G. BUNGE,
Attorneys for Petitioner.

Of Counsel:
PRICE, CUSHMAN, KECK & MAHIN,
134 South LaSalle Street,
Chicago, Illinois 60603.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

INDEX.

AUTHORITIES CITED.

Cases.

	PAGE
Elizabeth Arden, Inc. v. FTC, 156 F. 2d 132 (2d Cir. 1946), cert. denied, 331 U. S. 806 (1947)	3
Elizabeth Arden Sales Corp. v. Gus Blass Co., 150 F. 2d 988 (8th Cir. 1945), cert. denied, 326 U. S. 773 (1945)	3
FTC v. Simplicity Pattern Co., 360 U. S. 55 (1959)	4
In the Matter of American Greetings Corp., 49 FTC 446, 450 (1953)	3
In the Matter of Appleton-Century-Crofts, Inc., 47 FTC 1371, 1375-76 (1951)	3
In the Matter of General Foods Corporation, 52 FTC 798 (1956)	3, 4
In the Matter of Joseph A. Kaplan & Sons, Inc., 63 FTC 308, 1331-32 (1960), aff'd. and modified, 347 F. 2d 785 (D. C. Cir. 1965)	3, 4
In the Matter of Luxor, Ltd., 31 FTC 758 (1940)	3, 4

Statutes.

15 U. S. C. § 13 (Robinson-Patman Act)	
Section 2(a)	4
Section 2(b)	3
Section 2(c)	4
Section 2(d)	2, 3, 4
Section 2(e)	2, 3, 4, 5

Miscellaneous.

Antitrust Developments—1955-1968, as amended, 1968-1969 Pocket Supplement (supplementing the Report of the Attorney General's National Committee to Study the Antitrust Laws, March 31, 1955) 3

Rowe, Price Discrimination Under the Robinson-Patman Act (1962) 3, 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971.

No. 71-762.

EDWARD HINES LUMBER CO.,
A DELAWARE CORPORATION,

Petitioner,

vs.

CENTEX-WINSTON CORPORATION,
A NEVADA CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITIONER'S REPLY MEMORANDUM.

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The Petitioner, Edward Hines Lumber Co. (hereinafter "Hines") respectfully submits this Reply Memorandum in support of its Petition for Certiorari to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on August 25, 1971. This Reply directs itself to matters raised in the Brief in Opposition of Respondent, Centex-Winston Corporation (hereinafter "Centex").

ARGUMENT.

The Principal Reasons Urged by Petitioner in Support of Its Request for a Writ of Certiorari Are Uncontested.

The Brief in Opposition filed by Centex in large part tacitly admits the major contentions of the Petition for a Writ of Certiorari and is substantially unresponsive to the Petition. Centex does not dispute the crucial fact that this case presents an important question of first impression involving a key provision of the Robinson-Patman Act, i.e., whether Section 2(e) of that Act applies to differences in the timeliness of delivery service.

Centex also leaves substantially unchallenged Hines' contention that the decision below extending Section 2(e) to encompass such delivery services is inconsistent in principle with the Act as a whole, the legislative history of Sections 2(d) and 2(e) and the controlling decisions, administrative rulings and guidelines, and texts addressing themselves to this problem since the passage of the Act.

Centex states "the words of the statutes are to be taken in their usual and customary meaning" (Res. Br., p. 4). As set forth in detail in the Petition, for 35 years the usual and customary meaning of Section 2(e) has been that this Section, which imposes *per se* liability, does not extend to differences in the time of delivery nor, indeed, to services or facilities other than advertising and promotional allowances furnished in connection with the buyer's resale of goods purchased from the seller.

Centex's statement of the legislative history at page 5 of its brief is simply inaccurate. It is clear from the legislative history, and, in particular, from the remarks of Congressman Utterback that Sections 2(d) and (e) were concerned only with "the grant of discrimination under the guise of payment for advertising and promotional services

. . . [and] others by which the same purpose might be accomplished" (Pet., pp. 7-8). There is nothing inconsistent with the foregoing in the remarks of Congressman Utterback quoted by Centex (Res. Br., p. 6) or in Section 2(b) of the Act (Res. Br., p. 7). No text or other authorities read the legislative history as does Centex.

Centex's argument that because Section 2(d) deals with price-related discriminations, Section 2(e) must be construed to relate only to other types of discrimination (Res. Br., p. 6) is clearly contrary to the legislative history and the numerous judicial and other interpretations holding that these sections are substantially identical in scope,[1] and the many holdings that price related discriminations are illegal under 2(e).

Centex argues that Hines' authorities lack weight because only cases dealing with advertising and promotional services are cited to demonstrate the conflict of judicial decisions. This is precisely the point. Section 2(d) and 2(e) cases involve discriminations in the furnishing of promotional or advertising services in connection with resale because these sections only prohibit such discriminations. The "special packaging"[2] and "product return"[3] cases referred to by Centex are no exception. They involve advertising and promotional arrangements in connection with resale required to establish a 2(e) violation.

---

1. Rowe, p. 390. See *Elizabeth Arden, Inc.* v. *FTC*, 156 F. 2d 132, 134 (2d Cir. 1946), *cert. denied*, 331 U. S. 806 (1947); *Elizabeth Arden Sales Corp.* v. *Gus Blass Co.*, 150 F. 2d 988, 992-993 (8th Cir. 1945); *cert. denied*, 326 U. S. 773 (1945); Report of the Attorney General's National Committee to Study the Antitrust Laws, 189 (March 31, 1955).

2. *In the Matter of General Foods Corp.*, 52 FTC 798 (1956); *In the Matter of Luxor, Ltd.*, 31 FTC 658 (1940).

3. *In the Matter of Appleton-Century-Crofts, Inc.*, 47 FTC 1371, 1375-76 (1951); *In the Matter of American Greetings Corp.*, 49 FTC 446, 450 (1953); *In the Matter of Joseph A. Kaplan & Sons, Inc.*, 63 FTC 308, 1331-32 (1960), *aff'd. and modified*, 347 F. 2d 785 (D. C. Cir. 1965).

In both *Luxor* and *General Foods*, the special packaging was viewed as a sales promotional device which *directly* facilitated the resale by favored customers. *General Foods* expressly limited the applicability of 2(e) to promotional services connected with resale, stating at page 822:

> "Legislative history indicates that the purpose of Section 2(d) [and hence 2(e)] was to reach the evil of granting discriminations in the form of special allowances in purported payment of *advertising and other sales promotional services.*" [Emphasis added.]

In *Joseph A. Kaplan & Sons*, the Commission similarly rested its decision on the fact that the return privilege was a sales promotion device which furthered the resale of all the buyer's products. The other "product return" cases cited by Centex were not contested or litigated, and their importance is discounted by Rowe at page 378 of his book.

A review of the entire decision in *Simplicity Pattern*[4] shows that the Court had nothing more in mind than indirect price discriminations when it contrasted Sections 2(c), (d) and (e) with Section 2(a). The discrimination in that case was the granting of catalogs and display cabinets in connection with resale and the Court found that these advertising and promotional services were indirect price discriminations in violation of Section 2(d).

In sum, the only interpretation of Section 2(e) to which Centex can legitimately point as inconsistent with the "usual and customary meaning" of that statute is the decision of the Court below.

Referring to Thanksgiving turkeys and best-selling books, Centex speciously argues that sellers should be required to give relatively simultaneous delivery to all competing customers. This is, of course, completely unrealistic and explains why time of delivery has been traditionally a

4. *Federal Trade Commission* v. *Simplicity Pattern Co.*, 360 U. S. 55, 65.

question governed by contract between the parties and has never been a matter of federal regulation as a price discrimination under Section 2(e) of the Robinson-Patman Act.

For the foregoing reasons and the reasons set forth in the Petition heretofore filed, it is respectfully requested that a Writ of Certiorari be granted.

Respectfully submitted,

CHARLES B. MAHIN,
RICHARD L. REINISH,
JONATHAN G. BUNGE,
Attorneys for Petitioner.

Of Counsel:
PRICE, CUSHMAN, KECK & MAHIN,
134 South LaSalle Street,
Chicago, Illinois 60603.